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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 458.

BROTHERHOOD OF RAILROAD TRAINMEN, an Unincorporated Association, and C. O. CARNAHAN, General Chairman, Brotherhood of Railroad Trainmen,
Petitioners,

vs.

SIMON L. HOWARD, SR., and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONERS.

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REPLY BRIEF FOR PETITIONERS.

I.

The theory upon which the Court of Appeals reversed the judgment of the District Court is completely abandoned by Respondent. In his brief he makes no effort whatsoever to sustain this theory. He seeks to sustain the result, but only upon the theories presented by him (Resp. Brief 45).

The theory of representation which Respondent mainly relies on is dependent entirely upon his assumption that "membership in a craft or class is determined functionally by the duties performed" (Resp. Brief 25). Train porters make no other claim to representation by Petitioner Brotherhood except on the basis of their performance of some braking duties.

It should be particularly noted that Respondent is not seeking a reclassification for purposes of future representation by Petitioner. This, as we pointed out in our main brief, would be a non justiciable issue. He is, instead, seeking a declaration that train porters have at all times been members of the brakemen's craft and have been entitled to representation by Petitioner since the enactment of the Railway Labor Act (Resp. Brief 24).

So far as train porters are concerned, the fact that they did not seek or desire such representation seems to make no difference whatever. Their position is that Petitioner is chargeable with a breach of fiduciary duty even though no fiduciary relationship has ever been recognized as existing or has ever before been claimed to exist.

The duty of representation to a craft minority which Respondent asserts exists only by reason of and arises in the Railway Labor Act. Steele v. L. & N. R. Co., 323 U. S. 192, 202. That this duty of representation is not controlled by function or functional classification is expressly provided in the Act. Section 1, Fifth, defining an employee as one who performs work defined as that of an employee in orders of the Interstate Commerce Commission, expressly provides "**that no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action** * * *."

The term "craft" is not, itself, defined in the Act. This is because it was not intended to compel the creation of new craft lines based on function, but, rather "it was intended by Congress to adopt the designation of class or craft as determined by the then current working agreement between the railroad and particular groups or classes of its employees." Brotherhood of Railroad Trainmen v. National Mediation Board, 88 F. (2) 757, 760; See Petitioners' main brief, p. 19. Thus, **it is the action of employees in organizing that determines a craft and the duty of representation, not the functions of those employees.**

A craft, for purposes of representation, often comprises employees having vastly different functions and even, in some instances, employed in different departments of the railroad.[1] Yet a craft, so constituted, is nevertheless recognized as a craft because it is the result of the employees' act of organizing for the purpose of representation and bargaining.

Whatever meaning train porters may put upon the term "craft" in common usage, it is clear that the Railway Labor Act uses it to refer to a group of employees who have organized for the purposes of representation, and without regard to function. There can be no question here that train porters accepted the carrier's designation of them as a separate craft, and, as such, organized for the purpose of representation. The Railway Labor Act requires, therefore, that they be so recognized.

The craft status of train porters being the result of their own action without demand, request or even desire on their part for representation by Petitioner Brotherhood, the matter of their race, is, we submit, irrelevant. The failure to

1 See "Fifteen Years Under the Railway Labor Act Amended and the National Mediation Board 1934-1949," issued by the National Mediation Board, pp. 16-18, for a discussion of this and other problems of craft determination.

represent cannot be laid to racial prejudice, where there was neither a duty to represent nor a desire for such representation.

* * * * * * *

Respondent Howard's use of the term "negro passenger brakemen" in referring to train porters and "negro freight brakemen" in referring to negroes actually employed as brakemen creates a false impression with respect to both these groups.

So far as the train porters are concerned, the term "negro passenger brakemen" represents only a self-created title, one not recognized as having any application to them by anyone other than themselves and in no way controlling their craft status for representation purposes. The craft name of "train porter" was designated by the carrier at least forty years ago (as descriptive of the dominant function of the craft) and train porters have always been recognized by that title (R. 233). Individual train porters become such by reason of their employment in that name, and that in turn follows an application for employment as "train porter" (R. 227).[2]

With respect to negro brakemen, it should be understood that brakemen as such have both passenger and freight rights (R. 83). The carrier's use of negro brakemen exclusively on head end and swing jobs has resulted in them working only in freight service, since train porters generally performed head end braking duties in passenger service in the area in which negro brakemen are employed.[3] The agreement of March 7, 1946, if given its intended effect, would permit negro brakemen as well as white brakemen to bid in passenger jobs in accordance with their seniority.

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[2] Respondent Howard was originally employed as a brakeman in 1917, but, by reason of physical disability, he made written application for transfer to employment as a train porter (R. 33).

[3] The practice of not using negro brakemen as flagmen is solely the responsibility of the carrier based on local custom (R. 103). A proposed agreement covering this and other subjects (R. 98) was never executed or put in effect on this property.

III.

The agreement of March 7, 1946, was nothing more than an agreement by which a craft representative secured for members of the craft work that admittedly belongs to the craft. It was not the act of a governmental agency maliciously seeking the discharge of train porters on the basis of race.

The burden of Respondent's argument with respect to race boils down to this: That train porters suffered discrimination at the hands of the carrier in being designated as a separate craft despite the fact that, as part of their duties, they performed some braking functions. Therefore, Petitioner should have exerted its economic strength to overcome the opposition of the carrier and the acquiescence of the train porters themselves in this designation to have forced their inclusion into the craft of brakemen for the purposes of representation.

Neither the premise nor the conclusion of this argument is tenable. In arguing that the designation of train porters as a separate craft by the carrier was the result of racial discrimination they omit consideration of the significantly different treatment accorded negro brakemen and train porters by the carrier. Prior to Government operation of the railroads in World War I, negro brakemen received a substandard wage which was equalized with that of white brakemen by General Order 27. Following the return of the railroads to private operation the wages of negro brakemen was not thereafter reduced below that of white brakemen even though negro brakemen offered to accept such a reduction (R. 101). The wages of train porters were reduced. This difference in treatment could not have been based on race, since both negro brakemen and train porters are negroes. It was, we submit, in accordance with the fact that train porters had always constituted and been recognized as a different

craft, which recognition was in turn based on functional and other differences not related to race.

Even if the designation of porters as a separate craft were the result of racial discrimination by the carrier, however, it would not follow that the failure of Petitioner to represent them was a breach of fiduciary duty in the face of their acceptance of this designation. The very fact of their designation as a separate craft by the carrier indicates its opposition to their inclusion in the craft of brakemen. Their organization as a craft and selection of representatives in accordance with the Railway Labor Act without requesting or claiming representation by Petitioner conclusively establishes their acceptance of their craft status. Certainly, **the duty to represent must have some more substantial foundation than the mere belief by train porters that Petitioner, by a diversion of economic strength, could have forced their inclusion into the craft represented by it.**

We submit that the existence of racial conflict, involving others than train porters, cannot alone create a fiduciary duty to those to whom there has not otherwise existed such a duty. **If train porters were not negroes there would not be any duty to represent them on the facts of this case.** To argue that if they were not negroes the facts would be different is rank speculation.[4] Train porters seek here a discrimination in their favor by reason of their race. On no other basis can a judgment in this case go in their favor.

The argument that the agreement of March 7, 1946, was the result of governmental action for an improper purpose is wholly without merit. The right of labor to organize

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[4] The existence of jurisdictional disputes between crafts wholly or predominantly white is well known. Cf. Order of Railway Conductors v. Pitney, 326 U. S. 561; Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239; Brotherhood of Railroad Trainmen v. Templeton (8th Cir.), 181 F. (2) 527.

and enter into agreements with its employer exists apart from statute and is in no way dependent on a congressional grant of power. Texas & N. O. R. Co. v. Brotherhood Ry. & S. S. Clerks, 281 U. S. 548, 570-1; National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 33. That a craft may exert economic pressure to gain for itself the work claimed to belong to it has rarely been questioned; where it has, that right has been sustained. Senn v. Tile Layers' Protective Union, 301 U. S. 468, 481-2; 56 C. J. S., p. 153.

IV.

Respondent argues that the National Railroad Adjustment Board, First Division, is an improper tribunal for the consideration of train porters' claim because the labor organizations selecting the labor members of that Division do not admit negroes to membership and because four of the five organizations were parties to the agreement of March, 1928.

Whether this argument has any relevancy in the future depends on whether train porters assert contractual claims to the disputed work. So far as the present case is concerned they have expressly disclaimed any such claims (R. 17; Resp. Brief, 16).

This aside, however, the jurisdiction of the Adjustment Board is not made dependent upon the non-existence of conflicting or adverse interests in the membership of the respective divisions. Thus, in Order of Railway Conductors v. Pitney, 326 U. S. 561, the conductors who were there involved in a jurisdictional dispute with brakemen (represented by the Brotherhood of Railroad Trainmen) were required to secure a determination of their contractual rights by the Board even though the Brotherhood of Railroad Trainmen names one of the labor members of

the First Division. The reason for this is that the proceedings before the Board for the determination of contractual rights are against the carrier, not against another craft which may have an interest in the outcome. Railway Labor Act, Sec. 3 First (i).[5]

In the normal course of the Board's work there must, inevitably, be claims presented by groups not having direct representation on the Board and by groups not participating in the selection of representatives. That such claims may often involve conflicting interests of other crafts having such representation is obvious. The objections of train porters are no different than might be raised by any other group of employees where conflicting interests exist.[6] The courts of appeals of the 5th and 8th Circuits have rejected similar claims based on race, as has the supreme court of Missouri in a companion case to this one. Hampton v. Thompson (5th Cir.), 171 F. (2) 535; Missouri-Kansas-Texas R. Co. v. Randolph (8th Cir.), 164 F. (2) 4, cert. den. 334 U. S. 818; State ex rel. St. Louis-San F. Ry. Co. v. Russell, 358 Mo. 1136, 219 S. W. (2) 340, cert. den. 338 U. S. 849.

The Pitney decision indicates that the Board, in passing upon a claim by train porters, may consider the agreements of the brakemen as they relate to the same subject matter. This does not, however, convert the dispute into one between the two crafts. Cf. Order of Railroad Telegraphers v. N. O. T. & M. R. Co. (8th Cir.), 156 F. (2) 1, cert. den. 329 U. S. 758. It still remains a dispute between the porters

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5 The bipartisan makeup of the Board, equally divided between labor and carrier members, does not lend itself to the determination of disputes between crafts. The inevitable division of labor members in such case would permit the award to be dictated by carrier members according to self interest.

6 Respondent's argument that the train porters' case would go to a supplemental board having only two labor members, one of which is named by Petitioner, is incorrect. Cases not being handled by any of the four labor organizations participating in the supplemental boards are retained by the First Division (Resp. Brief, Appendix 18-19).

and the carriers involving an interpretation of the train porters' agreements.[7]

That such proceedings may result in conflicting contracts covering the same subject matter has been recognized by the courts and by the Board itself.[8] Since an award of the Board does not destroy the contractual rights of interested third parties, but only establishes the contractual rights of the actual parties, and is, in any event, not self executing, it is evident that the conflicting interests of the Board members need not, and, in practice, does not interfere with determinations on the basis of precedent and right. We submit that the alleged bias asserted by Respondent respecting the labor members of the First Division is not such as to warrant a holding in advance of a submission that the Board is not an appropriate tribunal to hear their claims. Cf. Edwards v. Capital Airlines, 176 F. (2) 755, cert. den. 338 U. S. 885.

Respectfully submitted,

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[7] The jurisdiction of the Adjustment Board, as fixed by Section 3, First (i), is limited to dispute between "an employee or group of employees and a carrier or carriers." Note that "group" is singular, not plural, clearly indicating that each group of employees is entitled to the interpretation of its agreements in a separate proceeding.

[8] Cf. Washington Terminal Co. v. Boswell, 124 F. (2) 235, 249, aff'd 319 U. S. 732. The reasoning of the Board with respect to this question is stated in Award No. 2253 of the Third Division, H. Nathan Swaim, Referee, and in Award No. 15220 of the First Division, A. Langley Coffey, Referee, excerpts of which are included in Appendix hereto.

APPENDIX.

Excerpt—Award 15220, National Railroad Adjustment Board, First Division, March 25, 1952.

"It seems to us that this is a private quarrel between two contracting parties of the kind and character this Division is freequently called upon to settle and which can be settled without the intervention of third parties. If the two carriers have made overlapping contracts with different labor organizations, the relief is to be obtained through negotiations and not by seeking to have the Division uphold one schedule of rules, on claim of conflicting interests, at the expense of the other, when both were bargained for in good faith."

Excerpt—Award 2253, National Railroad Adjustment Board, Third Division, August 10, 1943.

Any award made in these cases could have no direct effect upon the third parties. Any such award could only directly affect the parties to the contract who have come before the Board and are parties to the dispute. No award made in these cases would, or could, order the third parties to do or to refrain from doing anything, or in any other manner directly affect their rights. The claims filed by the employees, in effect, say to the carrier, "You have contracted with us to let us do this work and you have broken your contract by letting others do it. We are asking that you be compelled to fulfill your contractual obligation to us." An award could only order the carrier to comply with the contract. The method of compliance is left to the carrier. It might comply in a manner which would not affect the third parties who have been doing work covered by the agreement. On the other hand, the carrier might, in complying with an award, take the work away from the third parties. The carrier, without any

award, might take this work away from such third persons at any time unless it has also contracted to let such third parties do it. If the carrier breaches a contractual obligation by taking work away from such third persons, they have their remedy either by a claim filed with this Board or by an action in court.

Intervention by such third persons in these claims filed by the Clerks' Organization could be of no avail. If this Board should find in these cases that the Carrier has breached its agreement with the Clerks, there must be an award in favor of the Clerks; the Board's sole function is the interpretation and application of the agreement. It cannot alter an agreement for the relief of either party, even though it might appear that the work was also covered by an agreement with the third parties. If, therefore, the third parties were permitted to intervene and were able to show that the work in question was covered by their contract, that fact could not alter our award, if we found that the work was also covered by the Clerks' contract. We see no way in which this Board, acting within its jurisdiction, could save a carrier who has executed two agreements, the scope rule of which agreements cover the same work; nor do we believe it was the intention of the Congress in such a case to permit the employees covered by one such agreement to intervene and be heard in a claim filed before this Board by the employees covered by the other agreement.